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IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 1089

BARKEY IMPORTING CO.,

Petitioner,

v.

M. SHAFI IRAVANI MOTTAGHI

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioner, Barkey Importing Co., respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Second Circuit, rendered on March 29, 1957, as amended on April 29, 1957 and May 15, 1957, which reversed a judgment of the United States District Court in favor of petitioner, the defendant below, on an admitted counterclaim for $139,723.31 and remanded the same for further proceedings; the said Court of Appeals also reversed the action of the District Court in dismissing nine of ten causes of action of respondent's amended complaint on the merits, directed the entry of judgment for

the respondent on four of those causes of action and remanded the other five causes of action to the District Court for further proceedings. The Court affirmed the action of the District Court in dismissing the ninth cause of action on the merits.

Opinions Below.

The opinion of the district court is reported in 134 F. Supp. 719.*

The opinion of the Court of Appeals, as well as the amendments thereto have not yet been officially reported. The original opinion appears in the record (V–391-430)** as do the amendments (V–452-453, VI–4).

Jurisdiction.

The opinion of the Court of Appeals for the Second Circuit was filed on March 29, 1957; petition for rehearing denied, opinion amended by opinion filed on April 29, 1957. On May 15, 1957 an order was made by that Court staying the mandate for thirty (30) days pending the filing of this petition for certiorari, and at the same time the original opinion was again amended. The final judgment as amended is dated May 15, 1947.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C. §1254(1).

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* Inasmuch as nine additional copies of the record as printed for the use of the Court of Appeals have been filed pursuant to Rule 21(4), the opinion of the District Court is not appended to this Petition. Rule 23 (1-i). However, in view of the length of said opinion, for the convenience of the Court nine additional copies are filed herewith.

** References to the certified record will be to volume and page.

Questions Presented.

1. Whether a Court of Appeals has the power to reverse, set aside and remand a judgment in favor of the defendant on a counterclaim, that had been admitted in the plaintiff's pleadings, his brief submitted to the trial court and in his oral testimony.

2. Whether a Court of Appeals has the power to permit a party for the first time to contest in that Court, a counterclaim conceded at the trial.

3. Whether a Court of Appeals may set aside the findings of fact of a District Court without holding that such findings are "clearly erroneous".

4. Whether a Court of Appeals may, by reversing a final finding in favor of a defendant, reinstate tentative findings against him, from which he had no right of appeal; direct that judgment be entered thereon and thus cast the party into judgment with no right of appeal.

5. Whether a Court of Appeals may take a written exhibit, offered without qualification by a plaintiff, give effect to the part thereof favorable to such party while refusing to take cognizance of part of the same exhibit harmful to the party offering the same.

Statement.

(A) The Basic Facts.

This is a contract action by M. Shafi Iravani Mottaghi (hereinafter Iravani), a citizen of Iran, against Barkey Importing Co. Inc., a New York corporation (hereinafter BIC).

The amended complaint contained ten causes of action. The answer put in issue its material allegations. It also pleaded, among other defenses, an agreement of settlement and a counterclaim in two counts.

Trial of the action began on October 4, 1954, before Noonan, D. J. and a jury. After eight days of trial, the jury, at the request of counsel for both sides, was dismissed, and the trial then was continued before the Trial Judge alone for five additional court days.

In addition to oral testimony offered by each side, there were received in evidence approximately 200 exhibits. Upon the conclusion of the trial, briefs were submitted to the Court by each of the parties.

The Trial Court wrote an opinion of 84 pages that included its findings of fact and conclusions of law (134 F. Supp. 719-802). In it, the Court ultimately found against the plaintiff on each of his ten causes of action, and in favor of the defendant on the latter's counterclaim as admitted by the plaintiff. Consequently, the trial resulted in a judgment for BIC not only dismissing the plaintiff's ten causes of action but, granting a judgment for $139,723.31 on the defendant's counterclaim.

The action arises out of a number of carpet wool transactions between the plaintiff and the defendant. Iravani was an importer and exporter of various commodities. His place of business was in Teheran, Iran, while BIC was an importer of carpet wools located in New York City.

Iravani did business on a large scale. The transactions that gave rise to this controversy were his first efforts in the export of wool (I-3). In New York City, he was represented by one Randolph Valensi, a broker or agent for various exporters of wool and other commodities to the United States. Valensi had been Iravani's agent since February of 1947 or 1948—about two or three years before Iravani's first transaction with BIC.

Iravani entered into four written contracts with BIC to sell to the latter wool to be shipped by plaintiff from Iran. The first three contracts were made in New York City through Iravani's agent, while the fourth was made with Iravani personally at Teheran through BIC's agent, one Kitching, who died before the trial.

The first contract, dated December 8, 1949, provided for 350 tons of greasy white wool at a price of 60¢ per net pound clean basis (*i.e.*, the pounds yielded after scouring and removal of impurities in the United States) (I-4-5). The second contract, dated April 17, 1950, provided for 300 tons of white wool at 70¢ per clean pound (I-5). The third contract, dated April 21, 1950, provided for 100 tons of cream wool, or second white, at 60¢ per clean pound (I-6). The fourth contract, dated June 30, 1950, provided for 200 tons of white wool at 85¢ and 200 tons of cream wool at 75¢. This fourth contract was by its terms made contingent upon performance by Iravani of his obligations under the first three contracts (I-6-7).

Each of the written contracts contained the seller's estimate of the yield. This was necessary, because the amount eventually to be paid was to be calculated on a per net pound clean basis—*i.e.*, the pounds yielded after the scouring and removal in the United States of impurities in the wool as shipped.

BIC opened a letter of credit in connection with the first contract. In connection with the second contract, a letter of credit was opened but was made unavailable until the first credit had been fully utilized (I-10).

Caught in a rising market, Iravani succeeded in gaining concessions from BIC, among them, the deletion of the restrictive clause on the second letter of credit on June 19, 1950, and the opening of a letter of credit applicable to the fourth contract on or about October 9, 1950 (I-11, 66).

Although the first contract required shipment not later than February 15, 1950, Iravani made his first partial shipment against said contract on April 7th, 1950. Even before this date, BIC, because of Iravani's defaults, early in 1950, sent Valensi and Kitching, at its own expense, to Teheran, in order to hasten shipments of the wool. In spite of this, on July 7, 1950, after his return to this country, Valensi informed Iravani that although the first contract was then seven months old, BIC had received only 75 tons of off-grade wools and was in default with its customers (I-27). Included among said wools were quantities of colored wools. On or about August 18, 1950, BIC contracted with Iravani to purchase colored wools at a price of 42 cents (I-14).

After the first shipment Iravani refused to accept payments of 60 cents per pound for white wool. Consequently, he held back on forwarding his invoices. The Lemsterkirk, for example, sailed on May 21, 1950. Iravani drew three invoices against said shipment, one dated July 6th, at 60 cents; one dated July 6th at 70 cents; and one dated December 5th, 1950 at 60 cents (III-205, 219, 257).

The Settlement: Iravani arrived in the United States on January 28, 1951. At that time, the Bankers Trust Co. presented to BIC two drafts drawn by Iravani totalling approximately $430,000 (III-209, 230). According to BIC's allocation of Iravani's shipments, there was insufficient credit in his favor to pay said drafts. In addition, confusion had been engendered by Iravani's delays in shipping and by the several special agreements and modifications of Iravani's obligations to perform. The condition was such as to amply justify the District Court's findings that the disputes between the parties which are the subjects of the early causes of action developed before or shortly after Iravani's arrival, so that the existing situation required some sort of settlement (I-107).

The correspondence in November and December of 1950 indicates that Iravani was urged to come here specifically to settle "all pending accounts including unfinished contracts" (Barkey's cable of November 22nd at I-91; see also I-68, 93 and III-268).

On March 8, 1951, Iravani's agent, Valensi, drew a memorandum of a conference at which Valensi, Iravani and Barkey had been present, wherein he reported Mr. Barkey stating: "that he and Mr. Iravani had arrived at a final settlement concerning their old business". This memorandum was offered in evidence by Iravani (I-120, 150) and is quoted at length (*post* p. 16).

On March 14, 1951, Valensi wrote to Iravani in respect of the 142 bales consignment (Third Cause of Action), stating: "We are now given to understand that you have arrived at a final settlement with Barkey Importing Company, in which is included this accounting" (I-57, 58).

As to the terms of the settlement, the District Court found as follows in respect of BIC's testimony thereon.

> "Barkey testified as to the terms of the settlement agreement that Iravani was to ship 150 tons of white wool at $1.10 per pound, the half-and-half agreement was to be set aside, Iravani was to get billed values* less 5% for wool in fulfilling his second formal contract, and the fourth formal contract was to be cancelled" (I-140).

And in respect of Iravani's testimony, the District Court found (I-140):

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* The term "billed values" meant that on all future shipments beginning with the shipment on the *Steel Artisan*, which arrived February 4th, 1951, other than shipments on account of the 150 tons arrangement, Iravani was to be paid at the rate per pound which BIC received from the mills to which it sold the particular wool in question less 5%.

> "He was to ship 150 tons of white wool at $1.25, the half-and-half agreement and the four formal contracts as amended were to remain in effect as far as already executed and be cancelled to the extent that he still owed wool under them and the 395 ton consignment arrangement remained valid with prices at 95% of Barkey's prices."

The Court of Appeals not only accepted Iravani's version of the settlement, but, indeed, went a step further to include in the settlement agreement an alleged additional contract of joint venture between the parties which Iravani had never claimed to have been part of the settlement (V-405, 419, 422). It refused to credit the documentary proof that Iravani himself had offered.

The Court of Appeals also found that at the time Iravani arrived in New York, i.e., prior to the settlement, he had shipped 850 tons against the four written contracts which called for a total of 1,140 tons (V-404). Thus, prior to the settlement, BIC had the right to receive 290 tons at prices of 70 cents and 85 cents. As the Court of Appeals decided the case, the position of BIC following the settlement, was that it had the right to receive 150 tons of white wool at $1.25 and to continue to remain obligated on claims that had theretofore accrued in Iravani's favor.

(B) The Causes of Action.

Note: The District Court found that the first, second, third and fourth causes of action were released and discharged by the agreement of settlement made by the parties.

First Cause of Action: The first cause of action is based on a separate agreement, distinct from the four written contracts, which may be referred to as the color-averaging agreement. This agreement purportedly made about August

23, 1950, related to portions of the shipments aboard three specific ships, two of which had already arrived in New York City (*Lemsterkirk* had arrived July 17, 1950; *Designer* had arrived July 20th; and the third, *Lindekirk* had sailed August 5, 1950). The agreement provided for invoicing said portions at sixty cents per pound, being the average between seventy cents for white, and forty two cents for colored wools (I-15). Although the agreement was made about August 23, 1950 nothing further was heard with respect to same until three invoices covering the balance of wools on said three ships arrived in January of 1951. At the same time Iravani delivered a fourth invoice covering wools on the *Laagkirk*, a ship that was not included in the color-averaging agreement. All of the invoices were dated December 5, 1950 and billed the wools at the rate of 60 cents. There was no allocation as between white and colored wools, and there was nothing to indicate that they were indeed drawn pursuant to the color-averaging agreement (III-205, 207, 209, 211).

When these particular wools were delivered to it months earlier, BIC had charged them off against wools due under the first written contract and had credited Iravani therefor at 60 cents. In making its allocations to contracts, BIC proceeded to allocate chronologically, *i.e.*, against the first written contract until fully performed. It did so because it was utterly impossible to do otherwise. In the first place Iravani consistently was late in his invoicing. In the second place he withheld documents. In the third place his shipments were forwarded with incomplete or untintelligible documentation (I-44; III-183, 186, 187, 188, 190, 204, 259).

The gravamen of the first cause of action is Iravani's claim that he was entitled to 70 cents per pound on the white wools covered by the four invoices. The District Court

disallowed the claim on the fourth invoice relating to the S.S. *Laagkirk* and the Court of Appeals also rejected the claim. However, the District Court tentatively found that Iravani was entitled to ten cents per pound on the three other invoices, unless his claim therefor had been extinguished by a subsequent settlement. Concluding ultimately that the settlement agreement did extinguish the claim, the District Court held for BIC on this cause of action (V-412).

Second Cause of Action: The second cause of action is predicated upon a second special agreement between the parties to give financial assistance to Iravani. The correspondence in early August of 1950 evidences a price-averaging agreement whereby Iravani was authorized to invoice half of a shipment at 60 cents and the other half at 70 cents, contingent, however, upon Iravani delivering the balance of wool due to BIC under the old contracts by shipping them by the first available steamer from Khorramshah (I-12).

In June and July of 1950, Iravani in Iran delivered four invoices at 70 cents to Kitching, BIC's representative, and BIC paid the amounts as invoiced.

Though performance by BIC of the price-averaging agreement was subject to the condition precedent that Iravani must first complete the first and second contract by the first available steamer, he failed to do so. Also, said agreement required Iravani to invoice at 60 cents in respect of half of all future shipments. This in effect, he likewise failed to do. While he did invoice at 60 cents in respect of the four invoices covered by the first cause of action, he proceeded to demand 70 cents thereon.

Now, if Iravani had performed said price-averaging agreement, both the first and second written contracts

would have been fulfilled and the accounting would have evened itself out. Iravani failed to perform and BIC has been penalized because of such failure.

The District Court tentatively allowed additional credit to Iravani on three of the four invoices and denied recovery on the Designer invoice, holding that it had not been sufficiently identified. It concluded ultimately that said claim was extinguished by the subsequent settlement. The Court of Appeals reversed said finding on the ground that the claim was not embraced within the settlement, and granted additional credit at the rate of ten cents per pound on the three invoices and on the fourth as well (V-413).

In respect of the fourth invoice (Steel Designer, dated July 6, 1950), the Court of Appeals relied upon a letter of BIC to Kitching dated June 7th, which long antedated the price-averaging agreement and also antedated the deletion of the restrictive clause from the second letter of credit.

Third Cause of Action: Iravani's claim is based upon another special agreement which involved a consignment of 142 bales to be sold for his account and for which he was to be credited at the market price on the day of arrival, provided that he completed the written contracts (I-53-54). BIC credited him thereon at 85 cents for white wool. The District Court found the market price for white wool on the arrival date to be 91 cents, and tentatively granted Iravani additional credit at the rate of 6 cents per pound. However, the District Court made a specific finding that Valensi's letter of March 14, 1951 (I-57) pointed to the disposition of said claim in the settlement (I-58). The Court of Appeals reversed, and granted Iravani additional credit in the amount tentatively found by the District Court (V-414).

Fourth Cause of Action: This cause of action is based upon the half-and-half agreement of September 25, 1950. Under it Iravani was authorized to allocate his future shipments, half against his written contracts and half to be sold for his account at market (I-38).

In a letter dated November 23, 1950, Iravani stated that he was invoicing, pursuant to the half-and-half agreement, wool on two earlier shipments (*i.e.*, SS. *Lissekirk* and SS. *Lindekirk* notwithstanding the fact that both had been expressly excluded from that agreement (Exh. 115, I-38) and he urged that said agreement covered all previous shipments (I-44).

The four invoices drawn pursuant to the half-and-half agreement included the two that had been excluded. Both Courts disallowed additional credit thereon.

In respect of the two remaining invoices (SS. *Designer* and SS. *Artisan*) the District Court tentatively found additional credit in the sum of $73,017.94, but finally held that it was wiped out by the settlement agreement. BIC had contended at the trial that the limit of Iravani's claim should be $54,643.77. The Court of Appeals reversed the District Court's finding as to the settlement, and directed the entry of judgment in the amount tentatively found by the District Court.

Note: Because the Sixth and Tenth causes of action are closely related to the settlement agreement, we beg leave to interrupt the chronological order of discussing the causes of action in order to consider the Sixth and Tenth causes at this point.

Sixth Cause of Action: This cause of action is founded on Iravani's claim that 395 tons of wool were shipped to BIC on a consignment basis. BIC contended that the shipments were delivered and applied against Iravani's con-

tractual obligations as modified by the settlement agreement reached early in 1951. This is the same settlement that we have referred to at length at pages 6-8 hereof.

BIC, in performing the settlement agreement, paid Iravani $388,833.94 more than he would have received had he been held strictly accountable to his written contracts (III-275). However, Iravani asserts that he was entitled to best January prices regardless of BIC's billed prices, as provided in the settlement agreement; and thus, is entitled to an additional $107,152.67 (III-283).

The District Court, without directly ruling on Iravani's contention that there was a consignment, assumed, only for the purpose of its decision, that the contentions of Iravani were correct.

The Court concluded that the consignment could not exceed 375 tons, since Iravani had claimed 395 tons but had later admitted to delivering 20 tons less (I-116). Then, since a total of 619 tons had been delivered commencing with the *Steel Artisan* (III-274), and since 148 tons thereof were applied to the 150-ton phase of the settlement at $1.10, that left remaining 471 tons. Deducting therefrom 375 tons of alleged consignment wools, BIC would have had 96 tons that it could do with as it chose.

The District Court proceeded to analyze Iravani's itemization (III-283) and concluded that Iravani had received "best January prices" on all wools except at the very most, 72 tons (I-118).

The Court of Appeals did not accept the foregoing conclusion, even though it concurred with the District Court on the elimination from Iravani's claim those items in which he demanded additional credit based on $1.55 as the alleged price of cream wool, as against $1.35 actually credited.

Tenth Cause of Action: In this cause of action Iravani claimed that the settlement agreement which allegedly required delivery of 150 tons of white wool at $1.25 was subsequently modified, in June of 1951, to provide for 120 tons at a total price of $150,000. According to BIC it received virtually the entire 150 tons and paid therefor at the rate of $1.10. Included in said 150 tons are the 70 tons which Iravani allegedly applied to the joint venture.

According to Iravani, BIC accepted only 80 tons of the alleged 120, and refused to accept 40 tons thereof. The Tenth Cause of Action seeks recovery for damages measured by the difference between approximately $1.15 as the contract price and the resale price received by Iravani after BIC's alleged default, totaling $15,400.

The District Court found that the claimed modification was not borne out by the preponderance of the credible evidence. The Court of Appeals stated: "Although we do not find this decision unwarranted, we think that it ought to be left open for further consideration in the light of further proceedings after remand on the other phases of the settlement and on an over-all allocation" (V-426-7).

Fifth Cause of Action: In this cause of action, Iravani claims that a 292 bale shipment aboard the *Steel Artisan*, arriving in February 1951 was sent to BIC upon its oral agreement to sell the same as Iravani's agent (II-157-8). The agency was denied by BIC.

When Iravani arrived in New York in January, 1951, he represented to BIC that he had entered into a contract with Bijarchi (the shipper) for the purchase of said 292 bales; that he had paid a down payment thereon; and that the balance was to be paid against documents (I-80).

The Court of Appeals found that Bijarchi shipped the goods and sent the bills of lading to Murad, but this time not for Iravani's account (V-416).

Prior to shipment, the bales had been marked for Barkey Importing Co. (I-81). Iravani neglected to reveal to BIC that his check to Bijarchi's agent for approximately $2,000 had been returned by Iravani's bank with a note: "Refer to Drawer" (I-85).

There was a title dispute between Iravani and Murad who held the documents. In the meantime, BIC obtained possession of the 292 bales by posting with the steamship company a letter of guaranty from his bank which indemnified the steamship company for parting with possession without receiving the bill of lading.

BIC sold the goods and credited Iravani therefor at the sale price, less 5%, pursuant to the "billed price" phase of the settlement (Pro Forma Account #12, III-236). When it became apparent, however, that Iravani was not and could not deliver the documents, BIC eliminated the credit (Final Account #12, III-238). Thereafter, after Iravani had commenced his lawsuit, BIC was required to protect itself and purchased the documents from the then holder thereof (I-82-84).

Iravani claims the price realized by BIC on the sale of the wool, less the price paid by it for the documents, on the theory that as consignee and as Iravani's agent, BIC was required to account for the proceeds of the sale; was estopped from denying the principal's title to the goods; and was at no time permitted to purchase the documents for its own account.

The District Court made no express finding as to either the consignment or the agency, but examined the legal consequences of Iravani's claim on the hypothesis that an agency relationship existed; and determined that the failure by Iravani to reveal the fact of the dishonoured check constituted such a fraud as to debar him from recovery. The Court of Appeals clearly overlooked the

genesis of the relationship and it decided the issue as though the agency had been established and as though the issue were purely one of law (Footnote V-407).

Seventh and Eighth Causes of Action: These causes of action are based upon a claim by Iravani, denied by BIC, that in February 1951 the parties entered into a joint venture agreement to buy and sell wool with profits and losses to be shared equally.

These causes of action, as well as the reversal of the first four, depend to a great measure upon the effect to be given to a memorandum made by Iravani's agent, Valensi, of a conference between himself and Mr. Barkey at which Iravani was present. This exhibit, dated March 8, 1951, was offered in evidence by Iravani (Ex. 270; I-120-121). Its pertinent parts are as follows:

> "This morning Jack Barkey called me by phone and subsequently I interviewed him *in the presence of Mr. Iravani* (emphasis supplied) at his office concerning future business between Barkey and Iravani.
>
> "(1) It was stated by Mr. Barkey that he and Mr. Iravani *had arrived at a final settlement concerning their old business* (emphasis supplied) and that although Mr. Barkey had felt that the settlement was not very favorable to himself, under the circumstances it was the best that could be expected."
>
> • • • • •
>
> "4. In reply to my inquiry concerning the *modus operandi* in which Mr. Barkey and Mr. Iravani would conduct their business Mr. Barkey indicated that it would *probably* (emphasis supplied) assume the form of a profit sharing venture."

This exhibit is most important because of the effect which the Court of Appeals gave to it. The court ignored

paragraph "1" with respect to the settlement although it is definite and clear, and accepted the indefinite paragraph "4" as the main prop in determining that the parties had entered into a joint venture.

The Court of Appeals thus construed a prospective and possible profit sharing arrangement as a present and actual contract of joint venture, and this although the parties did not agree upon, or even consider the normal and usual terms of a joint venture agreement such as: (a) its duration, (b) the total of capital contribution; (c) the name; (d) place of doing business; (e) mechanics of handling funds; (f) books to be kept; (g) time to divide profits and share losses; (h) interest of the parties in the event of death or early termination.

The District Court found that there was no joint venture because, among other things, it could not "overlook the prior dealings, misunderstandings and hard feelings that had arisen between the parties." (I-136). Such decision was in line with prior decisions both Federal and New York State, *Farley* v. *Hill,* 150 U. S. 572; *Summa* v. *Masterson,* 215 App. Div. [N. Y.] 159, 162. However, the Court of Appeals came to a contrary conclusion.

Note: The ninth cause of action was affirmed (V-430).

The Counterclaim: The answer of BIC to the amended complaint set up a counterclaim in the amount of $177,039.86 for money laid out and expended for Iravani and for services (III-21-22, 28-37). The final amendment to Iravani's complaint, admitted that BIC was entitled to $133,736.14 for moneys that BIC generally advanced for Iravani's account, which could not be allocated to any of the causes of action alleged in the plaintiff's complaint (III-51). At the trial Iravani testified that he only challenged one item of $1,010.41 out of payments by BIC for his account of

$1,161,000 (III-84). Later in the trial Iravani's counsel withdrew the denial to the nine items of the counterclaim set forth at III-28 (III-181-2). In the brief submitted by Iravani's counsel at the conclusion of the case, they admitted that there was due to BIC $139,724.71, but on BIC's claim for only $139,723.31, judgment was awarded in that amount (I-151).

The Court of Appeals conceded that the plaintiff had made the admissions in his final amended complaint and in his brief (V-428), nevertheless it called attention to the fact that the counterclaim was contested on the appeal; held that the Court was not bound by a party's admission (V-429); and reversed and remanded (V-430).

(C) The Decision of the Court of Appeals.

To summarize the decision of the Court of Appeals, we find that the first four causes of action were reversed and the District Court was directed to enter judgment in favor of Iravani; with respect to the fifth, sixth, seventh, eighth and tenth causes of action and the counterclaim, the judgment in favor of BIC was reversed and remanded. The ninth cause of action was affirmed (V-430).

Basis for Federal Jurisdiction.

The basis for Federal jurisdiction in the first instance is diversity of citizenship between the parties, the respondent being a citizen of the Kingdom of Iran and the petitioner a corporation organized and existing by virtue of the laws of the State of New York.

Reasons for Granting the Writ.

The petitioner is not seeking certiorari merely because there was a reversal of a judgment in its favor. Certiorari

is sought because the reversal was so erronious that the decision, until corrected, will create a chaotic condition at least in the Second Circuit. This decision is not only in conflict with the decisions of other circuits and of the State of New York on the same matter, but the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, as also to call for the exercise of this Court's power of supervision pursuant to Rule 19(b) of the Revised Rules of the Supreme Court of the United States.

1. The Court of Appeals presumed that it had the power to disregard the admissions of a party and thus reversed and remanded a judgment in favor of BIC on a counterclaim that had been admitted in Iravani's pleadings, his brief to the trial court and in his oral testimony (III-51, 84, 181-2).

The Court concluded that it was not bound by such admissions because "a party's admissions are only evidence and not necessarily the truth" (V-429).

Professor Wigmore clearly demonstrated the effect to be given to such admissions when he wrote (Vol. 2 Wigmore on Evidence, Second Edition §1064 p. 536):

> "The pleadings in a cause are, for the purposes of use in that suit, not mere ordinary admissions, but judicial admissions; i. e. they are not a means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore a limitation of the issues. Neither party may dispute beyond these limits. Thus, any reference that may be made to them, where the one party desires to avail himself of the other's pleading, is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings."

See also *Tisdale* v. *R. Co.*, 116 N. Y. 416, 419; *New York Life* v. *Graham*, 92 F. 2d 377, 380 (9 Cir.); *Historical Pub. Co.* v. *Jones Bros. Pub. Co.*, 231 Fed. 638, 644 (3 Cir.), and *Coffin* v. *The President etc. Hydraulic Co.*, 136 N. Y. 655, 657.

2. The Court of Appeals also erred with respect to the counterclaim, when it presumed that it had the power to permit Iravani to contest the counterclaim for the first time in that Court (V-428). Permitting a party to raise a contention not raised before the trial court, for the first time on appeal, is not only contrary to the rules laid down generally by appellate courts, but it has been so decided by the Court of Appeals for the Second Circuit. *Patent & Licensing Corp.* v. *Olsen*, 188 F. 2d 522, 525 (2 Cir.); *Libbey-Owens-Ford Glass Co.* v. *Sylvania Indust. Corp.*, 154 F. 2d 814, 816 (2 Cir.).

3. The Court of Appeals (V-406-7) called attention to the fact that pursuant to Rule 52(a) Federal Rules of Civil Procedure, the "findings of fact shall not be set aside unless clearly erroneous". The Court then defined the meaning of "clearly erroneous" under the decisions of this Court in *United States* v. *U. S. Gypsum*, 333 U. S. 364, 395 (1948); and of the Second Circuit in *Gindorff* v. *Prince*, 189 F. 2d 897 (2 Cir.).

Having defined its powers, the Court of Appeals never, in any instance in its thirty page opinion, says that the findings of fact by the District Court were "clearly erroneous". Thus with respect to the first four causes of action the Court held that it disagreed with the conclusion of the District Court that such causes of action were discharged by the settlement agreement (V-412, 414, 415); fifth cause of action, remanded to determine whether the wool was sent on consignment (V-417); sixth cause of action, "we disagree with the district court" (V-421); seventh and eighth causes of actions, "Iravani has sustained his burden

of proof" (V-424); and with respect to the tenth cause of action, the District Court rejected the claim of Iravani of an oral modification of the settlement that required him to furnish 150 tons of white wool at $1.25 per pound to 120 tons at $1.15 per pound of which Barkey accepted only 80 tons. The District Court held (V-426), "We do not believe that that has been borne out by the preponderance of the credible evidence in this case". Far from holding that such finding was "clearly erroneous" the Court of Appeals held (V-426), "although we do not find this decision unwarranted, we think that it ought to be left open for further consideration in the light of further proceedings after remand of the other phases of the settlement and on an over-all allocation".

4. The petitioner concedes that the Supreme Court is not primarily concerned with the correction of all errors of a lower court. However, the determination of the Court of Appeals, with respect to the first four causes of action was not only erroneous, but it cast the petitioner into judgment without the right of even one appeal.

As we have pointed out (pp. 8-12), the District Court tentatively found in favor of Iravani on each of these causes of action, but held that any claim of Iravani was discharged by an agreement of settlement between the parties.

Since the result in the District Court was in favor of BIC, it had no right to appeal from the tentative finding in each cause of action in favor of Iravani. *Lindheimer* v. *Illinois Telephone Co.*, 292 U. S. 151, 176; *Gideon* v. *Hinds*, 238 F. 140 (2 Cir.); *Harding* v. *Federal Nat. Bank*, 31 F. 2d 914, 917 (1 Cir.). And now the Court of Appeals has affirmed the District Court's tentative findings in favor of Iravani by holding that these claims were not discharged by the settlement. Thus, BIC is cast in judgment with all right of appeal gone.

The final result is startling when we realize that in not one instance did the Court of Appeals say that the prior determination was "clearly erroneous"; in at least one instance (Fourth Cause of Action) the Court of Appeals held that there was very little evidence on the claim (V-415); and all of this came about because the Court either by error, or for a reason that is not apparent in the opinion, refused to give credence to Iravani's own exhibit that spelled out the settlement (*Supra*, p. 16).

The reversal of the District Court's judgment on these four causes of action becomes even more inexplicable when we find that LIC is criticized for not having appealed from the finding with respect to the Third Cause of Action (V-414), when, as we have shown, it had no right of appeal.

5. The Court of Appeals gave effect to paragraph 4 of Ex. 270, that was offered in evidence by Iravani, as its main prop in reversing the District Court with respect to the Seventh and Eighth Causes of Action (*supra*, pp. 16-17). At the same time the Court disregarded paragraph 1 of the same exhibit which proved the existence of the settlement agreement, as found by the District Court, and disposed of Causes of Action numbers One, Two, Three, Four and likewise affected Six and Ten.

By this strange separation of an exhibit offered by the plaintiff, the Court of Appeals departed from the accepted and usual course of judicial proceedings which require a court to hold that a document must be considered in its entirety, "the parts operating against the interest of the party offering it as well as the parts in his favor" 32 C. J. S. §774, p. 700. See also *Snell Isle, Incorporated* v. *Commissioner*, 90 F. 2d 481, 482 (5 Cir.), Cert. den. 302 U. S. 734; *Bulkly* v. *Kaolin Products Co., Inc.*, 187 App. Div. (N. Y.) 103, 108; *Barnsdall Refining Corp.* v. *Birnamwood Oil Co.*, 32 F. Supp. 308, 313 (D. C. E. D. Wisconsin).

Conclusions.

The ruling of the Court of Appeals creates an intolerable condition in the Second Circuit. Until corrected, every trial and appeal will be fraught with uncertainty in the following respects:

1. No litigant will be able to rely on the admissions of an opponent and will be obliged to be prepared to prove all issues whether contested or not. By the same token courts will be required to examine the truth and merits of every admission, and pleadings will no longer define the issues.

2. No party to an appeal can safely ignore issues not raised in the trial court.

3. All rules relating to the effect to be given to documentary proof offered by a party will be destroyed.

4. Unless the "clearly erroneous" doctrine laid down by this Court in *United States* v. *U. S. Gypsum*, 333, U. S. 869, 895 is clearly defined and limited, appellate courts will, as here, reverse matters merely because of disagreement with the trial court and not because such determination was in fact either "clearly erroneous" or failing in evidence to support it.

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5. The Court of Appeals has not only rendered a decision in conflict with its own prior decision and with the decisions of this Court and the Courts of Appeal of other circuits, but has so far departed from the accepted and usual course of judicial proceedings as also to call for the exercise of this Court's power of supervision pursuant to

Rule 19 of the Revised Rules of the Supreme Court of the United States, Title 28 U. S. C. A.

Dated: New York, June 13, 1957.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 1089.

BARKEY IMPORTING CO.,

Petitioner,

v.

M. SHAFI IRAVANI MOTTAGHI,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THOMAS F. MEEHAN,
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Respondent respectfully addresses himself to the five questions (Petition, p. 3) presented by Petitioner and refrains from a discussion of some inaccurate statements of fact contained in the Petition, relying that the disposition of the points presented by the Petitioner will make unnecessary the imposition upon the Court's time that a detailed consideration of the facts would cause.

AS TO QUESTIONS 1 AND 2:

Petitioner had counterclaimed in its answer for $177,039.86 (III-21). Respondent had not admitted this counterclaim in its reply but in fact had denied it (III-43). Yet Petitioner quotes Wigmore on "judicial admissions" when in fact it has to deal with a judicial denial. It is true that in another part of the complaint (III-51), Respondent had declared, in the "Wherefore Clause" that as against

its claim of $420,537.05 he was deducting a credit due to Petitioner of $133,736.14. But for the District Court to say that that statement constituted proof of a counterclaim can be shown very simply to be erroneous. For example, Respondent had actually received from Petitioner, for goods sold and delivered, more than $1,000,000 (See III-83). If respondent had made the mistake of asserting in the "Wherefore Clause" that he should have received from Petitioner the sum, say, of $1,420,537.05 but was giving credit to Petitioner of $1,133,736.14 already paid, would the District Court have given Petitioner judgment upon an amended counterclaim for $1,133,736.14? And this, despite that the counterclaim was specifically denied in the pleading? Of course not.

Again, Petitioner cites the statement of Respondent's attorney in the course of the trial (III-181-2) that he withdrew his denial of nine items in Exhibits I to IX. These items add and subtract to a figure of $7913.79 due Petitioner. This constituted a connecting of this $7913.79 as part of the $133,736.14 which Respondent had credited Petitioner with in the "Wherefore Clause." The fact that Petitioner admits making up his counterclaim of such items as these is evidence to the contrary of what is intended. It shows that a counterclaim cannot be founded upon money which had been paid and should have been paid. Notice that in that same statement at trial (III-181-2) Respondent's attorney again denied the counterclaim.

It is clear then that these credits to Petitioner by Respondent were mere manifestations of arithmetic, rather than admissions, and certainly not "judicial admissions" of anything. And in the light of their proper analysis, the Court of Appeals is shown to be eminently fair to Petitioner in sending its counterclaim back to the District Court for disposal with the entire case.

AS TO QUESTION 3:

The Petitioner uses the words "clearly erroneous" as if they possess mystical power. But this Court, in the very case cited by Petitioner, *U. S.* v. *Gypsum Co.*, 333 U. S. 364 (1947) states at page 395: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Can there be any doubt that the Court of Appeals thought that a mistake had been committed? Indeed there can be no doubt of mistake on the District Court's part. The District Court's decision was largely based upon its belief that Respondent had lied in two important particulars. Petitioner in its briefs to the Court of Appeals belabored this alleged false testimony at great length and for many pages. But the Court of Appeals showed that the District Court (See Vol. V—p. 423 and also pp. 425-6.) had misunderstood Respondent's testimony and that Respondent had in fact not contradicted himself or the record. Here then is conclusive proof of "clearly erroneous" findings by the trial Court which are pervasive of the whole record and not mere disagreements of opinion between two Courts.

AS TO QUESTION 4:

The District Court had found for Respondent on his first four causes of action. Then, in deciding the tenth cause of action, the District Court found that Respondent had disposed of those four claims by a settlement, and so finally gave Petitioner judgment dismissing the same. Though Petitioner did not formally appeal from the trial Court's decision thereon, it argued the merits of those four causes of action at length both in its briefs and orally before the Court of Appeals. The opinion of the

latter Court shows that the merits of those four causes of action were considered and acted upon by that Court (Vol. V, pp. 409-415). Despite that Petitioner had full hearing, therefore, on these four causes, it now complains it did not have a hearing. And it compounds the pretense by contending that it could not have appealed therefrom because it was the victor therein; but that is not correct. The test of whether they could have been appealed from is whether the adverse findings therein would be *res judicata*. (See *N. Y. Telephone Co.* v. *Maltbie*, 291 U. S. 645-1933.) And, of course, they are *res judicata*, obviously, since the issues involved were fully litigated and incorporated in a final judgment.

AS TO QUESTION 5:

Petitioner contends that Exhibit 270 (I. 120-121) was given effect to prove joint venture in favor of Respondent but that its effect as proof that a settlement was entered into was ignored. The Court of Appeals did not reverse the District Court's finding of a settlement. But it found the District Court in error as to the terms of the settlement, the terms testified to by the Petitioner having rightly been found by the Court of Appeals to be inherently impossible. But since Exhibit 270 did not mention the terms of the settlement it refers to, it was given full credence by the Court of Appeals. This complaint by Petitioner is thus completely baseless.

How then in the light of above can Petitioner seriously say that this is a case where the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings" as to call for the exercise of this Court's power of supervision pursuant to Rule 19? And

of course, no conflict has been shown either with other circuits or with prior decisions of the Second Circuit.

It is therefore respectfully submitted that this case is not a proper one for review by Certiorari in this Court and that the petition for a writ of Certiorari should be denied.

Dated June 17, 1957

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